LE COPY

Office-Supreme Court, U.S.
FILED
OCT 5 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964
No. 278

MONOLITH PORTLAND CEMENT COMPANY, a corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM M. BENNETT, PETER E. MITCHELL, EVERETT C. McKEAGE, GEORGE G. GROVER, and FREDERICK B. HOLOBOFF, the members of and constituting said Public Utilities Commission, and The Atchison, Topeka and Santa Fe Railway Company,

Respondents.

REPLY FOR PETITIONER.

ENRIGHT, ELLIOTT & BETZ,
JOSEPH T. ENRIGHT,
NORMAN ELLIOTT,
MICHAEL J. FITZPATRICK,
541 South Spring Street,
Los Angeles, Calif. 90013,
Attorneys for Petitioner, Monolith Portland Cement Company,

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

Page

I.

Constitutional question 1

II.

Respondents' contentions 3

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases — Page

Allen Manufacturing Co. v. Nashville, Chattanooga & St. Louis Ry. Co., 98 I. C. C. 405 4

California Portland Cement Company v. Public Utilities Commission, 49 Cal. 2d 171 6

Elk Cement & Lime Co. v. Baltimore & Ohio R.R. Co., 22 I. C. C. 84 3

Interstate Commerce Comm. v. Illinois C. R. Co., 215 U. S. 452 5

Mayor and City Council of Douglas, Ga. v. Atlanta, Birmingham & Atlantic R.R. Co., 28 I. C. C. 445 4

Meridian Traffic Bureau v. Southern Ry. Co., 60 I. C. C. 5 4

Milk & Cream to New York City, 45 I. C. C. 412 .. 3

Northern Potato Traffic Assoc. v. Atchison, Topeka & Santa Fe Ry. Co., 178 I. C. C. 237 3

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 5

Southern California Edison Co. v. Railroad Commission, 6 Cal. 2d 737 5

Southern Pacific Company v. Public Utilities Commission, 41 Cal. 2d 354, app. dis 346 U. S. 919 6

Texas & Pacific Ry. Co. v. United States, 289 U. S. 627 4

United States v. Baltimore & O. R. Co., 333 U. S. 169 6

Statute

California Public Utilities Code, Sec. 1757 5

IN THE

Supreme Court of the United States

October Term, 1964
No. 278

MONOLITH PORTLAND CEMENT COMPANY, a corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM M. BENNETT, PETER E. MITCHELL, EVERETT C. MCKEAGE, GEORGE G. GROVER, and FREDERICK B. HOLOBOFF, the members of and constituting said Public Utilities Commission, and The Atchison, Topeka and Santa Fe Railway Company,

Respondents.

REPLY FOR PETITIONER.

I.

Constitutional Question.

We do not propose to reargue the contentions advanced in the petition. However, several points suggested by Respondents merit brief comment. To place the matter in the proper perspective, it is necessary to understand the thrust of the constitutional question raised by the petition.

As the California Commission's Opinion acknowledges:

> "Inasmuch as Respondent [Santa Fe] has suggested *no* other differences in transportation circumstances and conditions between the points involved and because Monolith and Santa Fe vigorously disagree regarding the competency, relevancy and materiality of the expense [contract], it is necessary to consider . . . the contract . . ." (Emphasis added). 62 Cal. P. U. C. 49, 56.

Respondents do not and cannot challenge petitioner's showing that the sole predicate for the questioned rates was the California Commission's conclusion that the Southern Pacific—Santa Fe surcharge-penalty arrangement might lawfully be directly assessed exclusively against shippers on the leased track (such as petitioner) resulting in the approval of what would otherwise clearly be discriminatory rates in favor of petitioner's competitors.

It is this naked conclusion that petitioner challenges as being constitutionally invalid as a denial of equal protection of the laws, and of due process.

The parties are in accord as to the power of a state to make rational legislative classifications stemming from a difference between rate-payers having a fair and substantial relation to the object of the legislation—in this case, the evil of discriminatory rates.

The question is, are unequal rates for equal service, which would otherwise be unlawfully discriminatory, redeemed by the peculiarities of the railroads' joint trackage agreement? That is, does such a classification as the California Commission has made rest upon a

ground of difference having a fair and substantial relation to the object of transportation rate regulation; or, is it arbitrary, subject as it is to the vagaries of the railroads' private arrangement with each other which produces inequitable rates?

II.

Respondents' Contentions.

A. *Respondent Commission speciously argues that petitioner is not disadvantaged or injured by the drastically reduced rates granted exclusively to petitioner's competitors, since petitioner still has an absolute rate advantage of 3 cents per 100 pounds on shipments to San Joaquin Valley points.* (Brief, p. 5). Competition at work contemplates that the more distant producer pay higher rates and accept lower profits to extend its natural market, thereby recognizing the natural competitive advantage of a producer in its own area. What the Commission has sanctioned is the abrogation of natural market competition and the substitution of a hidden subsidy to petitioner's competitors, who may now artifically expand their market at petitioner's expense. The Commission candidly concedes [62 C. P. U. C. 49, 50] that this is "such type of case."

B. *Respondent Commission asks rhetorically how a competitor who is the complainant could be injured by a rate higher than his rate?* (Brief, p. 5). The answer lies in the fact that, as the Interstate Commerce Commission has consistently held,* the lower rates are

---

*E.g., *Northern Potato Traffic Assoc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 178 I. C. C. 237, 245 (1931); *Milk & Cream to New York City*, 45 I. C. C. 412 (1917); *Elk Cement & Lime Co. v. Baltimore & Ohio R.R. Co.*, 22 I. C. C. 84 (1911).

higher in the relative sense, that is, when distance is considered, and thus result in prejudice. Such situation is but a variant of the rule that unlawful discrimination results from charging unequal rates for equal service. *Texas & Pacific Ry. Co. v. United States*, 289 U. S. 627, 656. Certainly a carrier ought not to be free to deprive a shipper of equal treatment in the matter of rates merely because the shipper possesses a natural competitive advantage of proximity to the common market,** which the carrier desires to eliminate.

C. *Respondent Commission argues that petitioner seeks use of mileage alone as the exclusive rate-making factor.* (Brief, pp. 5, 7). Not so!

What petitioner contends is that in evaluating the "composite and intricate picture in fixing railroad rates" (Commissioner's Brief, p. 5), a holding that otherwise discriminatory rates for similar transportation services are constitutionally innocuous cannot be justified solely because of a trackage agreement between two railroads calling for a surcharge-penalty. Petitioner submits that such voluntary act of the railroads is neither relevant nor material in fixing lawful rates. That is, though irrelevant in rate analysis, it is critically relevant, indeed repulsive in legal effect when it blatantly penalizes freight originating on the joint track.

**Meridian Traffic Bureau v. Southern Ry. Co., 60 I. C. C. 5, 11 (1920); *Mayor and City Council of Douglas, Ga. v. Atlanta, Birmingham & Atlantic R.R. Co.*, 28 I. C. C. 445, 450 (1913); *Allen Manufacturing Co. v. Nashville, Chattanooga & St. Louis Ry. Co.*, 98 I .C. C. 405, 407 (1925).

D. *Although both the Commission (Brief, p. 6) and Santa Fe (Brief, pp. 9-10) apparently argue that the California Commission's ultimate "findings" of non-discrimination are insulated from judicial review, such argument is misplaced.*

First, California Public Utilities Code, Section 1760 explicitly provides that:

> "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court *shall exercise* an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question *shall not be final.*" (Italics ours).

As the California Supreme Court has pointed out, *Southern California Edison Co. v. Railroad Commission*, 6 Cal. 2d 737, 744, such provision for independent judicial review of the law and the facts when an order was challenged on federal constitutional grounds, was no doubt enacted to cure the fact that standing alone, Section 1757 (relied upon by Respondents here), was unconstitutional under the doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287.*

---

*This necessary provision for judicial review of constitutional questions, unfettered by so-called "findings" phrased in the language of the statute, has long been the rule with regard to decisions of the Interstate Commerce Commission. *Interstate Commerce Comm. v. Illinois C. R. Co.*, 215 U. S. 452, 470, as the cases cited by Respondent Commission (Brief, p. 6) acknowledge.

Second, it is well established that if an ultimate finding on non-discrimination is premised on an erroneous view of the law (as petitioner urges is the case here), such finding cannot stand. *California Portland Cement Company v. Public Utilities Commission*, 49 Cal. 2d 171, 175.

Finally, where, as here, the evidence is undisputed, and because of constitutional safeguards a conclusion justifying discriminatory rates cannot be drawn, such conclusion is plainly not entitled to finality. *Southern Pacific Company v. Public Utilities Commission*, 41 Cal. 2d 354, appeal dismissed, 346 U. S. 919.

E. *Respondent Commission seemingly argues that the doctrine of United States v. Baltimore & O. R. Co., 333 U. S. 169 is limited to cases involving the division of joint rates* (Brief, pp. 7-9). Compare this Court's sweeping language in *Baltimore* (which was not a joint rate division case) that:

> "But the command of Congress against discrimination cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination."

So, here, the command of the California Constitution and statutes against discrimination cannot be subordinated to the command of the railroads' joint track arrangement.

It is undisputed that the 1912 contract has expired and that the railroads, by mutual agreement, are merely miantaining the *status quo* pending the resolution of their controversy over track rental, and that any new track rental arrangement is expressly made retroactive to January 1, 1962. Thus, if the penalty-surcharge

feature is eliminated by the Interstate Commerce Commission on the merits (as it well may be), such holding will be retroactive, thus destroying the asserted factual basis for the rates assailed here. That is, the pivot on which the challenged rates turns is still *sub judice*. Yet, under the California Commission's Opinion, petitioner is required to bear such penalty as a part of its current rate, with no provision for remission if the penalty is stricken down by the Interstate Commerce Commission.

F. *Respondent Santa Fe argues that the Southern Pacific-Santa Fe track arrangement provides that Santa Fe may use the track only to "bridge" traffic and that the additional penalty provided when traffic is originated on the track is typical of many joint trackage agreements (Brief, pp. 5-6).** Respondent Commission asserts that Santa Fe pays "a penalty . . . for doing business on the joint track or 'bridge'" (Brief, p. 9). But this is a patent misconception of this situation.

The Mojave-Bakersfield track owned by Southern Pacific and utilized by Santa Fe as "required by law" is not a spur, or a small isolated track adjoining or subsidiary to a principal right of way. Rather, it is part and parcel of the "main line" from Southern California to and through the San Joaquin Valley and points north. Santa Fe wanted the transportation business from these commercially fecund areas of a rich producing and consuming state. To obtain such, it forebore the expense of constructing its own track as Southern Pacific had done. Rather, it bought the

---

*Even if true, this would not justify a rate discrimination (absolute or relative) where the transportation service is the same.

use of Southern Pacific's tracks and fixed the consideration therefor in part in terms of traffic originating on the portion of the track which it did not possess. Fortuitously, petitioner is the sole significant shipper affected by this rate located on this portion of track. Factually, petitioner did not have a voice in the railroads' agreement which so drastically affected its established function as a *competing* cement producer. Most unfortunately, petitioner must suffer the impact of the burdens of Santa Fe's benefit, which ricochet as benefits to petitioner's competitors. In truth, Santa Fe is not penalized—in legal effect Santa Fe pays "consideration," petitioner pays the penalty. Santa Fe is gambling in the competitive transportation market with petitioner's chips, and petitioner is denied a seat at the table. To continue the analogy, petitioner contends that the Commission has misapplied the "rules of the game," and requests the Supreme Court to act in order to assure petitioner a "fair deal."

The crux of the matter is not the abstract validity of such a penalty-surcharge (although it is an anachronism in this case), but the constitutionality of justifying otherwise discriminatory rates to petitioner solely upon such a voluntary agreement, in which petitioner is an injured rather than an active party.

Petitioner does not request that Santa Fe be required to reduce rates from Monolith if, with due regard to constitutional dictates and transportation criteria, such reduced rates are found to be non-compensatory.* Pe-

*It should be noted that neither respondent had ever believed them to be non-compensatory until Santa Fe decided to leapfrog petitioner's competitors into petitioner's natural market area at petitioner's expense.

titioner goes beyond the question—begging of the non-compensatory issue, and urges the crucial constitutional issue—that equal rates for equal service are required by California law, and that the reduced rates deny to petitioner the equal protection of the laws and due process of law.

G. *Both Respondents argue that the challenged decision of the California Commission involves only the valid exercise of state regulatory power respecting intrastate rates.* This circuitous argument is, however, necessarily premised on the tacit assumption that the Commission's classification was reasonable and not arbitrary, and thus assumes the very question here in issue. As we have shown, there is compelling authority for the proposition that such classification is both irrational and repugnant to the basic purpose of the regulation of transportation rates.

Conclusion.

The petition submits an important question of transportation law, and as to the constitutional power of a state regulatory body to discriminate between citizens by a classification plainly repugnant to the basic purpose and object to the very legislation the regulatory body purports to enforce.

For the reasons stated in the petition and in this reply brief, the petition should be granted.

Respectfully submitted,

ENRIGHT, ELLIOTT & BETZ,
JOSEPH T. ENRIGHT,
NORMAN ELLIOTT,
MICHAEL J. FITZPATRICK,
Attorneys for Petitioner, Monolith Portland Cement Company.